IN THE SUPREME COURT OF FLORIDA

RONALD LEE WILLIAMS,

Appellant, **CASE NO.: SC05-226**
Lower Tribunal No.: 90-3515-CFA-01

v.

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT
APPEAL FROM DENIAL OF 3.850 MOTION FOR POSTCONVICTION RELIEF

JOSEPH F. MCDERMOTT, ESQUIRE
MCDERMOTT LAW FIRM, P.A.
7116-A Gulf Blvd.
St. Pete Beach, FL 33706
Ph: (727) 367-1080, Fx: 367-9940
SPN: 00002251, FBN: 052469
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The parties will be referred to as they stood in the trial court and the following references used:

OR -	Original Record on Appeal
T -	Original Trial Transcript of Testimony – Court Reporters Page Numbers
R -	Post Conviction Record on Appeal
PCT -	Post Conviction Transcript of Testimony Court Reporters Page Numbers
D -	Docket Printout

STATEMENT OF THE CASE

Defendant, Ronald Lee Williams, was indicted by an Escambia County Grand Jury for first degree murder[1], attempted first degree murder, and kidnapping. The indictment charged defendant with the premeditated murder or felony murder of Derek Devan Hill, Mario Alfonso Douglas, Michael Anthony McCormick, and Mildred Jean Baker; the attempted premeditated murder or felony murder of Amanda Merrill; and six counts of kidnapping as to those individuals and Darlene Crenshaw. (R 763-764) The crimes are alleged to have occurred in Escambia County, Florida, on or about September 20, 1988. (R 1047–1051) Defendant was tried by jury and found guilty as charged on May 10, 1991. (R 1275–1278) The jury recommended a life sentence. (R 1280) On June 21, 1991, Circuit Judge Nickolas P. Geeker adjudged defendant guilty of first degree murder

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[1]Four co-defendants were also indicted on the four homicides, to wit: Timothy Robinson, Michael Coleman, Darrell Frazier and Bruce Frazier. Robinson, Coleman and Darrell Frazier were convicted. They received a jury recommended sentence of life and each were sentenced to death by Circuit Judge Nickolas P. Geeker. A notice of appeal to this Court was filed by the co-defendants.

Jurisdiction was relinquished as to Darrell Frazier, Case No. 74,943. He was resentenced by Judge Geeker subsequent to appellant's trial. He received a life sentence and filed a notice of appeal to the First District Court of Appeal (Docket Nos. 91-2424, 91-2651).

As for co-defendant Bruce Frazier, the State permitted him to plead to the lesser included offense of second degree murder and he was sentenced to a term of fifty (50) years concurrent as to each homicide count.

and sentenced him to death. (R 1306–1314) Defendant was also adjudged guilty of attempted first degree murder and sentenced to a life term, and was adjudged guilty of the six kidnapping counts and sentenced to a life term, concurrent as to each and concurrent with the attempted first degree murder sentence. (R 1294–1304)

Jury trial began May 7, 1991. Defendant was found guilty of all counts on May 10, 1991. Penalty phase was conducted on May 11, 1991 with the jury recommending life imprisonment. Motion for New Trial was denied June 21, 1991 and Defendant sentenced to consecutive death sentences. (Docket P. 23)

Defendant filed Notice of Appeal to the Florida Supreme Court on July 1, 1991. (Docket P. 24) (R 1315)

Defendant's convictions and sentences of death were affirmed August 13, 1993. (Docket P. 27) (R 104-126)

After several attempts to appoint conflict free counsel, Attorney Joseph F. McDermott of St. Pete Beach, Florida was appointed September 22, 1998. (Docket P. 31)

Motion for Post-Conviction Relief was filed August 2, 1999 (a so-called "shell" motion had been filed March 24, 1997, (R 289-455)), along

with a Motion to Reconstruct Judge Geeker's office file. (Docket P. 34) (R 648-651) The reconstruction motion was denied. (R 657-658)

Affidavit and Suggestion to Disqualify Judge Geeker was filed August 18, 1999. (Docket P. 34) (R 652-656) The Motion to Reconstruct Judge Geeker's court file was denied August 25, 1999. (Docket P. 34) On August 27, 1999 Judge Geeker denied the Suggestion for Disqualification. (Docket P. 34) (R. 659)

Notice of Appeal was filed August 30, 1999 to appeal the denial of the reconstruction of the court's file and discovery deposition. (Docket P. 34) (R 660- 662) That appeal was dismissed without prejudice, November 2, 1999. (R 907)

Evidentiary hearing was held April 11, 2001. (R 959-1107)

Defendant sought to Amend/Supplement his 3.850 Motion on August 5, 2002, based upon Ring v. Arizona, 536 U.S. 584 and Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). (R 1217 – 1266)

Defendant thereafter filed a Second Motion on August 30, 2004 to Amend/Supplement his 3.850 (R 1293 – 1296) seeking support from Blakely v. Washington, 542 U.S. 296 (2004).

Order Denying Defendant's Motion for Post-Conviction Relief was filed January 4, 2005 (R 1312-1500) and Notice of Appeal timely filed January 28, 2005. (R 1501 – 1502)

The Florida Supreme Court denied Williams relief in Williams v. State, 622 So. 2d 456 (Fla. 1993).

The Florida Supreme Court struck the aggravators of avoiding or preventing a lawful arrest and heinous, atrocious and cruel (could not be vicariously applied to defendant). Other aggravators were upheld to wit: pecuniary gain and cold, calculated and premeditated, other capital felonies (3 other victims), accomplice to robbery, sexual battery, burglary and kidnapping.

STATEMENT OF FACTS
GUILT AND PENALTY PHASE

The following is an excerpt of facts from the Florida Supreme Court decision in Williams v. State, 622 So.2d 456 (Fla. 1993), (R 1236):

> The evidence establishes that Defendant Williams ran a drug trafficking ring from Miami that extended from Miami to Pensacola. In September of 1988, Bruce Frazier, who oversaw Williams' Pensacola operation, became concerned that his ex-girlfriend would alert the police to the drug ring. Bruce Frazier and Michael McCormick, a street-level employee, moved a safe containing cocaine and money from one of the apartments used in the drug business to Michael McCormick's apartment. During a telephone conversation, Williams told Bruce Frazier to go to McCormick's apartment to obtain other money that McCormick owed Williams. Upon reaching the apartment, McCormick informed Bruce Frazier that the money he owed Williams and the safe they had just moved from Bruce Frazier's apartment had been stolen. Bruce Frazier called Williams and informed him of the situation and the fact that there were no visible signs of a forced entry into McCormick's apartment. Bruce Frazier testified that Williams allegedly stated that he was sending some people up to Pensacola to get the money and drugs back.
>
> On September 19, 1988, Williams sent Timothy Robinson, Bruce Frazier's brother Darrell Frazier, and Michael Coleman from Miami to Pensacola to begin a search for the missing cocaine and money. These individuals met McCormick and Bruce Frazier at a hotel in Pensacola and went to McCormick's apartment. After obtaining several weapons from McCormick, they went to the apartment next door and forced their way in. In the apartment were Darlene Crenshaw, Amanda Merrill, Derek Hill, and Morris Alfonso Douglas. Mildred Baker, McCormick's girlfriend was brought in shortly thereafter. Hill, Merrill, Baker, and Douglas were ordered to take their clothes off. They were then bound and gagged, and made to lie on the floor. The four men then began interrogating the prisoners. After his demands regarding the whereabouts of the money and cocaine went unanswered, Robinson began stabbing Hill. Meanwhile, the other

accomplices physically assaulted some of the other hostages with kitchen knives found in the apartment.

At this point, Darlene Crenshaw stated that she knew where the stolen contraband was and that McCormick was involved in the theft. After Crenshaw's revelation, McCormick was also stripped, tied up, and stabbed several times. The Fraziers took Crenshaw to her apartment where they retrieved the cocaine and cash. The Fraziers left Crenshaw at her apartment and returned to Hill's apartment.

Meanwhile, at Hill's apartment, Mildred Baker and Amanda Merrill were repeatedly raped by Robinson and Coleman. The men were apparently stabbed and slashed several more times. Once the Frazier brothers returned, Coleman and Robinson systematically began killing the prisoners. All of the prisoners except Merrill died at the scene. Coleman first slashed Merrill's throat several times. Someone then shot Merrill in the back of the head. After the men left, Merrill was miraculously able to free herself and call 911.

At the trial Darlene Crenshaw, Amanda Merrill, and Bruce and Darrell Frazier testified for the State. It was undisputed that Williams was in Miami at the time the crimes were committed and did not shoot or stab any of the victims himself.

Darlene Crenshaw testified that Hill and Douglas had taken the safe, left it at her house, and returned on the morning of September 19, 1988, in order to open it. A portion of the money and drugs in the safe was left at her house. She testified that, later that evening while she was at Hill's apartment with Merrill, Douglas, and Hill, three armed men forced their way into the apartment and demanded the return of their "stuff." A fourth man brought in Mildred Baker a few minutes later. Crenshaw stated that one of the Fraziers kept demanding his "stuff". After telling the Fraziers that she knew where the money and drugs were, she was allowed to dress. On the way to her house, one of the Fraziers stated that he only wanted his "stuff" and that Crenshaw would not be hurt. One of the Fraziers then allegedly stated that he would "take care of the guys." She testified that, once they had located the stolen contraband, the Fraziers left her at her house.

Amanda Merrill testified that after Crenshaw had been taken away by the Fraziers, Robinson began physically and verbally abusing Douglas and Hill, and that she was repeatedly raped. She testified that soon thereafter she heard someone come into the apartment and say, "We got what we want. Come on, let's go." She stated that another person then said, "No, I'm going to do this." Merrill then stated that she heard a gunshot and heard Mildred Baker begging not to be killed. She stated that she heard Robinson say, "Get down, bitch," and that a shot rang out. Coleman then entered the room and cut Merrill's throat. Coleman later cut her throat two more times. Finally, she stated that someone entered the room and shot her in the back of the head.

Bruce Frazier testified that in February, 1988, he established a drug operation for Williams in Pensacola. He rented an apartment where he kept a safe containing money and drugs. He testified that the entire episode began when he suspected that his ex-girlfriend would alert the police to the operation. Bruce Frazier testified that, after going to McCormick's apartment, they went next door and forced their way in. Frazier also stated that, as he and Darrell were leaving with Darlene Crenshaw, Robinson told him to "kill the girl" if the police got behind them. He testified that, upon returning to McCormick's apartment, he saw a girl lying on the bed with her throat cut and Derek Hill lying on the floor with his throat cut, and that McCormick had been stabbed in the back. Bruce Frazier testified that his brother Darrell stated that they had gotten what they came for. Robinson commented that they had one more thing to take care of before they left. Bruce Frazier stated that Coleman then shot McCormick in the head. Bruce stated that he then left the apartment, followed shortly afterwards by his brother Darrell. Bruce Frazier explained that, at this point, he heard two more shots and then saw Coleman and Robinson leave the apartment. He testified that, upon returning to Miami, he met with Williams, Darrell Frazier and Gwen Cochran; that Cochran stated that she could be charged as an accessory to murder; and that Williams replied that he could "get the most time" because he ordered the people to be killed. Bruce Frazier concluded his testimony by stating that his intent had been to merely investigate the theft, and get the money and drugs back.

Darrell Frazier testified that, during the several days prior to the murders, he, Williams, Coleman, and Robinson met several times to discuss the theft and at one meeting Williams stated that, if McCormick was involved with the theft, he should be "dropped." Both Darrell and Bruce Frazier testified that Williams ordered them to "drop" whoever was involved with the theft of his money and drugs. Darrell also testified that, after returning from Crenshaw's house, he told Robinson, "Let's go man. We got what we came for," and that Coleman responded "no, man, the nigger told us we got to drop them, man." Darrell Frazier also stated that, upon returning to Miami, Williams paid him, Robinson, and Coleman $9,000.00 each and paid Bruce Frazier $3,000.

During the trial, the State introduced evidence pertaining to two drive-by shootings that occurred in Jacksonville several months before the incident in Pensacola. Bruce Frazier testified that, in 1988, Vernon McClendon, an employee from whom Williams rented a house where drugs were sold, decided to end his association with Williams and start his own drug operation. Bruce Frazier stated that McClendon had not taken anything that belonged to Williams, but that, nevertheless, Williams decided that McClendon should be killed. Frazier further testified that he, Williams, Timothy Robinson, and Kelvin McKinney traveled to Jacksonville, bough several automatic weapons with Williams' money, and attempted to kill McClendon and his girlfriend, Honey Rose Hurley. Frazier testified that Williams had ordered that they kill McClendon. Another witness, Rufus Williams, testified that Ronald Williams had ordered them to "drop" McClendon in order to avoid competition. Frazier testified that, as Hurley approached a toll both, he pulled alongside her car and Robinson shot her several times. They also shot McClendon in a similar drive-by fashion.

The jury, at the conclusion of the guilt phase, found Ronald Williams guilty as charged.

At the penalty phase, the State relied on the testimony presented during the guilt phase of the trial. The defense presented the testimony of five witnesses. Eartha Copeland, a seventy-year-old friend of Williams' family, testified that she had known Williams since he was a child and that he came from a good and loving family. Alfred Wright, Williams' cousin, testified that he had grown up with

Williams in Vidalia, Georgia and that Williams had never been in trouble with the law before moving to Miami. John Morris, a friend of Williams' family, testified that Williams had been kind to him in the past. Morris asked that Williams' life be spared. In spite of the fact that Michael McCormick, one of the victims, was the father of her children, Shirley Williams, the defendant's sister, testified that Williams was a very gentle and kindhearted person, who never did anything disruptive in his entire life. Williams' mother, Louise Williams, stated that Williams had a normal childhood, was compassionate with his siblings, and helped his family as much as he could. The jury recommended a life sentence.

Darrell Frazier was originally convicted and sentenced to death. However, the trial judge subsequently reduced Darrell Frazier's sentence to life imprisonment for his substantial assistance to the prosecution in Williams' conviction. Timothy Robinson and Michael Coleman were also found guilty and sentenced to death for their participation in this incident. We have affirmed both of their convictions. *Robinson v. State*, 610 So.2d 1288(Fla. 1992); *Coleman v. State*, 610 So.2d 1283(Fla. 1992).

The trial judge adjudicated Williams guilty of four counts of first-degree murder, one count of attempted first-degree murder, and six counts of kidnapping. In his sentencing order, the trial judge found the following aggravating circumstances: 1) Williams was previously convicted of another capital felony—the murder of the other three victims—or of felonies involving the use or threat of violence; 2) the murders were committed while Williams was an accomplice in a robbery, sexual battery, burglary, and kidnapping; 3) the murders were committed for the purpose of avoiding arrest; 4) the murders were committed for pecuniary gain; 5) the murders were heinous, atrocious, or cruel; 6) the murders were committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification. While finding that no statutory mitigating factors were present, the trial judge did find the fact that Williams was a loving family member to his son and mother to be a non-statutory mitigating factor.

The trial judge concluded that the six aggravating factors outweighed the one mitigating factor and sentenced Williams to death.

STATEMENT OF FACTS
3.850 EVIDENTIARY HEARING
APRIL 17, 2001

Defendant presented his trial counsel, Randall Etheridge as his first witness. Etheridge testified he had handled 20 - 25 death penalty case usually with co-counsel. (PCT 5) He did not seek co-counsel (PCT 6) although it was a difficult case. (PCT 6)

Of four other co-defendants, three (Darrell Frazier, Timothy Robinson and Michael Coleman) went to trial, received life recommendations and death overrides by Judge Geeker. (PCT 9)

Defendant, Bruce Frazier negotiated a plea in return for his testimony and a reduction of Daryl Frazier's death sentence.

Although, Defendant Williams expressed fear of Judge Geeker in view of the overrides, Attorney Etheridge did not pursue a disqualification. (PCT 9 – 11)

Attorney Etheridge did not ask for a jury instruction on independent act although Defendant Williams was in Miami and did not actually participate in the homicides. (PCT 14)

The trial court took judicial notice of the original trial record and transcript. (PCT 15)

Attorney Etheridge in response to the following question stated:

Q. Don't you think that that law (independent act) applied to this situation since he was not an active participant in Pensacola?

A. Yes, sir.

Attorney Etheridge obtained a mental health expert, Dr. Larson to evaluate Defendant Williams. Larson's report was not presented to the jury or to Judge Geeker at the penalty or sentencing phases. Neither did Etheridge's sentencing memorandum contain reference to the report. (PCT 17)

Defendant then introduced Exhibit 1, Dr. Larson's report. (PCT 18) The report established Defendant's full scale IQ of 75 "in the borderline range" and that defendant "…intellectually functions as a 13 or 14 year old average adult male. His intellectual functioning is in the lower fifth percentile". (PCT 22)

Mr. Etheridge's response to whether functioning at a 13 or 14 year old level could have been a mitigator:

A. Yeah, it could have been a mitigator. I chose not to put it on." (PCT 23)

Other than Dr. Larson, Etheridge did not pursue any other mental examination or mental mitigation.

Petitioner's Exhibit #2 was a May 9, 1991 memo authorized by Mr. Etheridge. (PCT 26) The memo stated that Defendant was advised by Mr.

Etheridge that the first and last closing would be traded for any testimony in his behalf. Mr. Etheridge agreed that this was not a correct statement of the law. (PCT 27) Mr. Etheridge claimed a secretarial error in the memo. (PCT 30)

Mr. Etheridge argued to the jury that Defendant had been convicted of a drug offense. (PCT 31) Etheridge also expressed his personal opinion that his client is in prison where he belongs for doing that. (PCT 33)

Etheridge's first statement to the jury was:

> "This cocaine business; he was not – he's not charged with that. He's been found guilty of that and he's in prison where he belongs for doing that." (PCT 34) (T 882)

and further:

> "He's in prison right now where I personally think he needs to be for that conviction. He's not on trial for being a cocaine trafficker; he's on trial today before you for being a murder." (PCT 35) (T856). Petitioner's Composite Exhibit 3.

Mr. Etheridge claimed this to be a tactical decision.

Assistant State Attorney Patterson argued to the jury that various testimony was "undisputed", "uncontradicted", "nobody took the stand", "nobody said that". (T 836-838)

Mr. Etheridge agreed that it could be improper comment on the prosecutor mentioning the Defendant's right to remain silent; (PCT 39)

Q. If it's something that can only be refuted by a defendant, then it would amount to a comment on not testifying.

A. I concur.

(PCT 39)

Sentencing Orders for Darryl Frazier, Timothy Robinson and Michael Coleman were introduced as Petitioner's Exhibit 4, 5 and 6. (PCT 43) Exhibit 7 was Mr. Etheridge's sentencing memorandum. (PCT 44)

Mr. Etheridge testified and the record revealed that he elected not to present the psychological report in the penalty phase. (PCT 70) The Court also conducted a colloquy with Defendant as to the report. (PCT 70) Etheridge did not present the report to the judge. Mr. Etheridge agreed that evidence that Defendant Williams who had borderline intelligence of a 13 or 14 year old would be a powerful mitigator.

Dr. Larson's report is also significant as it reflects defendant's "improvished childhood", "beatings with an extension cord", "parents frequently drank to point of intoxication", "neighborhood a ghetto", "erratic school history", "dropped out . . . when he was 16", "lengthy drug abuse history", "not recommended for employability", "personality disorder". (Defendant's Exhibit #1; Post Conviction Hearing)

Etheridge also acknowledged that the theory of his case was independent act and supported a jury instruction on independent act. (PCT 81) There was no "on record" waiver of Mr. Williams testifying. (PCT 83)

Mr. Etheridge in response to questions regarding his jury arguments said "certainly that personal interjection should not have come in." (PCT 89) He did not consult with Defendant about making these personal representations. (PCT 89)

Defendant Williams testified that he was advised by Mr. Etheridge that he would lose opening-closing arguments if he testified. (PCT 94) He further stated he asked Mr. Etheridge to seek disqualification of the judge. (PCT 96)

Mr. Etheridge tried to shift blame for the erroneous memo to his secretary. However, he admitted he was responsible for the Defendant's trial and the memo. (PCT 123)

SUMMARY OF ARGUMENT

Defendant's trial counsel fell far below Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) standards for effective assistance claims. The cumulative effect of the errors makes it even more serious than any one issue alone.

Judge Geeker's failure to disqualify himself in the 3.850 proceeding and his persistent overrides in related cases gave Defendant little chance to prevail in a post-conviction proceeding.

Lastly, Defendant asserts that the Blakely decision states that the jury trial right is a fundamental right and not procedural. This should change the failure to grant retroactively in previous cases.

ISSUE I

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

FAILURE TO REQUEST AN INDEPENDENT ACT INSTRUCTION ALTHOUGH THIS WAS THE PRIMARY DEFENSE.

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.
2. DEFICIENCY AND PREJUDICE PRONGS – DE NOVO
BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)

Florida Standard Jury Instructions now incorporate a standard instruction on Independent Act. This adopts long-standing law.

The instruction reads:

3.04(h) Independent Act

> "If you find that the crime alleged was committed, an issue in this case is whether the crime of (*crime alleged*) was an independent act of a person other than the defendant. An independent act occurs when a person other than the defendant commits or attempt to commit a crime,
>
> Elements: 1. which the defendant did not intend to occur, and
>
> 2. in which the defendant did not participate, and

3. which was outside of and not a reasonably foreseeable consequence of the common design or unlawful act contemplated by the defendant.

If you find the defendant was not present when the crime of (*crime alleged*) occurred, that does not, in and of itself, establish that the (*crime alleged*) was an independent act of another.

If you find that the (*crime alleged*) was an independent act of [another] [(*name of individual*)], then you should find (defendant) not guilty of the crime of (*crime alleged*).

At the 3.850 Hearing April 17, 2001, Ronald Lee Williams' original trial counsel, Randall Etheridge testified:

Q. That brings me to another issue. You indicated that your evidence, the evidence or discovery indicated to you that Mr. Williams was in Miami and did not actually participate

A. Correct.

Q. All right. Did you seek the instruction called independent act?

A. Not that I recall.

MR. McDERMOTT: All right. Your Honor, for the purpose of this record, I think also it's frequently necessary in the appeal to refer—in an appeal to refer to the original trial record or transcript pages.

THE COURT: Yes, sir.

MR. McDERMOTT: And I would ask the Court to take judicial notice of that so we don't have to seek the

introduction of the entire volumes of that trial. I believe that's what the Supreme Court generally does.

THE COURT: Yes, sir. I'll grant that request.

MR. McDERMOTT: All right.

Q. (By Mr. McDermott) You have no recollection of filing an instruction for independent act?

A. No, sir.

Q. Don't you think that the law applied to this situation since he was not an active participant in Pensacola?

A. Yes, sir.

(3.850 Transcript pgs. 14 – 15)

* * *

Q. The - - Mr. Spencer asked you some questions about Coleman and Robinson in the presentation of the testimony and he read a portion of the transcript that I believe you read that you argued both of them snapped, the word snapped was used?

A. Yes, sir.

Q. And, again, wouldn't that theory that those participants snapped, Mr. Williams is in Miami, bolster the idea of the independent act theory?

A. Certainly.

Q. And requesting an instruction for independent act?

A. Yes, sir.

Q. Are you aware that Florida now has an independent act? A standard jury instruction on independent act?

A. Yes, sir.

Q. But in any event, the law hasn't changed on that, you could always ask for one, correct?

A. You could ask for one, whether you got it or not is another story.

Q. Okay, But this case, did it not to your seem ripe for that type of theory, wasn't that your actual argument?

A. Yes, sir.

Q. Even going into the case, the State agreed that Mr. Williams wasn't in Pensacola when this homicide – these homicides occurred, correct?

A. Yes, sir, they did.

(3.850 Transcript pgs. 80-82)

It is clear by Mr. Etheridge's testimony that the defense of independent act was viable to Mr. Williams' case but he neglected to request such instruction.

In Lewis v. State, 591 So.2d 1046 (Fla. 1st DCA 1991), a 3.850 Motion based upon the identical issue was granted on appeal. The Court held:

> In his post-conviction motion, appellant claims that counsel was ineffective in failing to request a jury instruction on the law applicable to his theory of defense

> – that the homicide was the result of the independent acts of the co-defendants. Appellant argues that he was entitled to the instruction that the jury could not find him guilty of murder, even under the felony murder rule, if the jury found that the murder was the result of the independent acts of the defendants.
>
> It is well established that a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions. *Hansbrough v. State*, 509 So.2d 1081, 1085 (Fla. 1987); *Smith v. State*, 424 So.2d 726 (Fla. 1982); *Bryant v. State*, 412 So.2d 347, 351(Fla. 1984); *Motley v. State*, 155 Fla. 545, 20 So.2d 798(1945).

See also Bryant v. State, 412 So.2d 347(Fla. 1982) where the Florida Supreme Court held:

> [2] The State suggest that Bryant's liability for first-degree felony murder is predicated on his participation in the robbery and that the trial court properly refused to instruct on independent act because Bryant's theory of defense is not supported by any reasonable view of the evidence. We disagree. In this case, there was evidence to support Bryant's theory of defense, and the requested instruction should have been given. Where there is any evidence introduced at trial which supports the theory of the defense, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense when he so requests. *Motley v. State*, 155 Fla. 545, 20 So.2d 798 (1945).

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) is the landmark case guiding ineffective assistance claims.

Judge Geeker's order denying the 3.850 as to this ground glosses over the import of the Lewis and Bryant cases. He alludes to defendant's

participation in an underlying felony, but the record is far from clear on what that felony might be.

The failure to request the independent act instruction alone should cause reversal of defendant's conviction. Its cumulative effect is apparent from other trial deficiencies.

ISSUE 2

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

COUNSEL'S INJECTION OF PERSONAL BELIEFS IN OPENING AND CLOSING STATEMENTS THAT DEFENDANT DESERVED TO BE IN PRISON.

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. **DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.**
2. **DEFICIENCY AND PREJUDICE PRONGS – DE NOVO BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)**

The following excerpts from defense counsel's argument are set forth:

> "He's been found guilty of that (dealing in cocaine) and he's in prison where he belongs for doing that." (T 882) (PCT 34)
>
> * * *
>
> "So, please don't find him guilty of murder because he's a drug trafficker. We admit that. We told you in our opening argument. We give - - you've got us. There's no doubt about that." (T 856) (PCT 35)
>
> * * *
>
> "He's in prison right now where I personally think he needs to be for that conviction." (T 882) (PCT 35)

Mr. Etheridge conceded that those matters were not in evidence. (PCT 37)

In Clark v. State, 690 So.2d 1280(Fla. 1997), the Florida Supreme Court condemned similar argument in a penalty phase.

The Supreme Court held:

> "Our review of Clark's counsel's closing argument causes us to conclude that counsel's comments were so extremely inappropriate and damaging that counsel's performance was clearly below the standard we require and expect of counsel in capital proceedings. Counsel's performance resulted in a sentencing phase which was not a reliable adversarial testing."
>
> * * *
>
> "As evidenced by his closing statements, counsel failed to function reasonably as an effective counsel when he indicated his own doubts or distaste for the case and when he attacked Clark's character and emphasized the seriousness of the crime. Counsel completely abdicated his responsibility to Clark when he told the jury that Clark's case presented his most difficult challenge ever in arguing against imposition of the death penalty. When counsel virtually encouraged the jury to impose the death penalty, he assisted the prosecution in making its case. In so doing, he deprived Clark of adversarial testing of the prosecution's case. Accordingly, we find counsel's performance in his closing argument to be deficient."

The infliction of defense counsel's personal belief and fact of defendant's conviction (not in evidence) transcended the bounds of defense advocacy.

ISSUE 3

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

FAILURE TO OBJECT OR REQUEST MISTRIAL TO PROSECUTOR'S CLOSING STATEMENT THAT AMOUNTED TO COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. **DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.**
2. **DEFICIENCY AND PREJUDICE PRONGS – DE NOVO BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)**

The prosecution made a number of references to undisputed or uncontradicted testimony (Trial Transcript p. 828, 836-838).

> "That's who it was. Everybody knew it, undisputed, uncontroverted. Nobody took the witness stand and said, oh, no, they belonged to Jit, they belonged to Yoge. No, nobody said that. Every single witness knew who the boss was.
>
> * * *
>
> "There are some undisputed facts about what happened, and they all went in, they all made everybody take their clothes off, and they started hitting and kicking and cutting and torturing the people there.
>
> * * *
>
> "They got whatever information they wanted from Tina, and then they decided they were going to get their drugs.

> So they bring her out and get her dressed. And this is undisputed.

Counsel Etheridge did not object to these comments. (3.850 Transcript PCR 39)

Prosecutorial comments which can only be refuted by the Defendant, amount to comments or failure to testify. Etheridge's failure to object to those is ineffective assistance of counsel.

In Rodriquez v. State, 753 So.2d 29(Fla. 2000) the Court set forth the "fairly susceptible" test for interpreting comments as to defendant's failure to testify.

The Rodriquez Court stated:

> "For example, in *Marshall* we concluded that the prosecutor erred by stating in closing that "the only person you heard from in this courtroom with regard to the events on November 9, 1981, was [the one witness to the crime]." 476 So.2d at 1519emphasis supplied). In *Marshall*, the State argued that the prosecutor's remarks constituted a comment on the evidence before the jury. As explained by the Fourth District's opinion, "[s]ince only two people witnessed the events in question, *38 and one of those chose not to testify, we cannot accept the state's argument that the prosecutor's remarks amount to nothing more than a comment on "the evidence as it existed before the jury." *Marshall v. State*, 473 So.2d 688, 689(Fla. 4th DCA 1984)" 'A Constitutional violation occurs . . . if either the defendant alone has the information to contradict the government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as a comment on the failure to testify'".

The case of Marshall v. State, 473 So.2d 688 (Fla. 4th DCA 1984) is cited by the Florida Supreme Court in Rodriquez, supra. Marshall holds:

> [2] . . . Cases like this fall under the rubric announced in *United States v. Bubar*, 567 F.2d 192(2d Cir. 1977), *cert. denied*, 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 151 (1977): "A constitutional violation occurs … if either the defendant alone has the information to contradict the government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify.: 567 F.2d at 199. See also *United States v. Riola*, 694 F.2d 670 (11th Cir. 1983); *State v. Bolton*, 383 So. 2d 924 (Fla. 2d.)

ISSUE 4

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

ERRONEOUS ADVICE TO DEFENDANT AS TO LOSING CLOSING ARGUMENTS IF HE SHOULD TESTIFY

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. **DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.**
2. **DEFICIENCY AND PREJUDICE PRONGS – DE NOVO BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)**

Mr. Etheridge's memo of May 9, 1991 (Petitioner's Exhibit 2) is telling evidence that he told Defendant Williams that he would lose opening – closing arguments to the jury if Defendant testified. Etheridge's claim of typographical error rings hollow in view of the existence of the memo for ten years without correction or modifications. As Mr. Etheridge conceded, he, and not his secretary is responsible for the memorandum.

Defendant Williams testified:

> Q. All right. Would you relate to the Court what the discussion about your testifying involved?
>
> A. Mr. Etheridge wanted to get the open and closing statement.
>
> Q. To the jury?
>
> A. To the jury.

Q. Okay.

A. And said if I testify – if I'm not correct. If I testify, we won't get it.

Q. If you testify, we won't get it?

A. Right.

(3.850 Transcript pg. 93-94)

The Second District Court in Jackson v. State, 700 So.2d 14 (Fla. 2nd DCA 1997), the Court held:

> "The order denying the motion states that Jackson "admits in his motion that his counsel advised him of the advantage of not testifying and having a double closing argument and that he "has failed to show how he was coerced, how his counsel's performance was deficient, and that he was prejudiced by this deficiency." Jackson's allegations are sufficient to show that counsel's performance was deficient because, contrary to what Jackson claims his counsel told him, his testimony would not affect his right to first and last closing arguments." See Fla. R. Crim. P. 3.250 ("a defendant offering no testimony in his or her own behalf, except the defendant's own, shall be entitled to the concluding argument before the jury") (emphasis added). However, because Jackson failed to show that the deficient performance prejudiced the defense, the trial court reached the correct result. *Oisorio v. State*, 676 So.2d 1363, 1365 (Fla. 1996).

Although the 2nd District denied relief based upon failure to show prejudice. Defendant testified he wished to testify to his denial of involvement in the Pensacola homicide:

A. I wanted to testify because I know he got what they was going to say by reading all these depositions, so I had to make my point clear.

Q. Your point which was what?

A. I didn't have anything to do with those people being killed.

(3.850 Transcript pgs. 94-95)

Obviously, the prejudice is the jury's failure to hear the Defendant himself testify to his lack of involvement. This would also strongly support his defense of independent act.

The trial court's order addressing this issue evidently places more credence in Mr. Etheridge's belated testimony than his own memo. Such holding appears to run in the face of the manifest weight of evidence – the memo itself.

ISSUE 5

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

FAILURE TO SEEK DISQUALIFICATION OF JUDGE GEEKER BASED UPON HIS MINDSET TO IMPOSE A DEATH SENTENCE

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.

2. DEFICIENCY AND PREJUDICE PRONGS – DE NOVO BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)

Three previous co-defendants went to trial, were convicted of 1st Degree Murder and the jury recommendation of mercy as to each. Overriding the jury's recommendation, Judge Geeker sentenced all three co-defendants to death. The sentencing orders in those cases are virtually identical. (Instruments 86, 87, and 88. PCR 1126 – 1143)

Defendant Williams requested Attorney Etheridge to seek recusal of Judge Geeker base upon his fear that he would not get a fair trial. Although, William's jury recommended mercy, Judge Geeker overrode that for the fourth time. The Court's comment at the sentencing of Williams is clear evidence of a judicial mindset that Mr. Williams would also be sentenced to death. The trial court at sentencing stated:

> THE COURT: If the facts of this case, just as the facts in the other case do not warrant the imposition of the death penalty, then there can be no cases where the death penalty will be warranted or justified. Accordingly, the Court finds in this case that the jury's recommendation of life imprisonment to be unreasonable and without justification and therefore it should be and it will be overridden for the reasons more fully explicated and set forth in the order by the Court stating reasons for imposition of the death sentence.
> (Sentencing Transcript pg. 3)

Porter v. Singletary, 49 F.3rd 1483 (11th Cir. 1995) granted a state prisoner a hearing based upon his claim of prejudice of the judge. In that case, the Federal habeas corpus motion alleged … "specific and ostensibly evidence that the judge had fixed predisposition to sentence this particular defendant to death if he were convicted by the jury."

The case of Goines v. State, 708 So.2d 656 (Fla. 4th DCA 1998) holds that failure to seek disqualification of trial judge was prejudicial error.

The 4th District Court stated:

> "Disqualification is ordinarily required in any situation where the facts are reasonably sufficient to create a well founded fear in the mind of the moving party that he will not receive a fair trial. *Fisher v. Knuck*, 497 So.2d 240, 242, (Fla. 1986.) In *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla.. 1990), and *Livingston v. State*, 441 So.2d 1083, 1086 (Fla. 1983), the court has made clear that the legal sufficiency of a motion to disqualify a trial judge turns on whether "the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.:565 So.2d at 1335, 441 So.2d 441, 446 (Fla. 4th DCA 1992), we held that the facts underlying

> the well-grounded fear must be judged from the perspective of the moving party."
>
> * * *
>
> "We conclude that in the absence of a reasonable tactical decision not to do so, it constitutes ineffective assistance not to seek disqualification on the grounds revealed in this case, which plainly show a reasonable fear of judicial bias."
>
> * * *
>
> "As we have just seen, Lockhart rejects a reliance on mere outcome as the test for prejudice. We also note that when a legally sufficient basis for judicial disqualification has been shown the law ordinarily does not require that the party seeking disqualification still show that the result would be different before an impartial judge.
>
> The primary evil in having a judge whose impartiality might be reasonably be questioned is not in the actual results of that judge's decision making. Rather it is the intolerable appearance of unfairness that such a circumstance imposes on the system of justice. Public acceptance of judicial decision making turns on popular trust in judges as neutral magistrates. The judicial system fails to present a plausible basis for respect when a judge's impartiality can reasonably be questioned."

Armed with the three (3) sentencing orders imposing override death sentences and Judge Geeker's statement at sentencing was sufficient evidence that the court lacked impartiality. Defense counsel's failure to pursue disqualification constituted ineffective assistance of counsel.

Judge Geeker spends considerable thought on lack of timeliness of the motion. Disqualification for prejudice or predisposition for death does not

have a time limit. Due Process does not have a time limit for disqualification. Florida Statute 38.02 imposes a time limit for disqualification for interest in the proceeding. Florida Statute 38.10 provides disqualification for prejudice and has no delineated time factor.

ISSUE 6

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

FAILURE TO PROVIDE THE TRIAL COURT WITH A SUBSTANTIAL MITIGATOR – DR. LARSON'S REPORT SHOWING DEFENDANT TO BE BORDERLINE RETARDED FUNCTIONING AT A 13 – 14 YEAR OLD LEVEL

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. **DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.**
2. **DEFICIENCY AND PREJUDICE PRONGS – DE NOVO BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)**

Trial Counsel obtained a psychological report from Dr. Larson. (Petitioner's Exhibit 1) This report or Dr. Larson's testimony was not presented to the jury or to the trial judge at the sentencing (SPENCER) hearing. (PCT 16-18)

Dr. Larson's evaluation reflected Defendant to have a full scale "IQ of 75 and was in the borderline range". Dr. Larson further calculated a mental age for defendant functioning as a 13 or 14 year old male and that his intellectual functioning was in the lower fifth percentile. (PCT 22)

Other than Dr. Larson, Mr. Etheridge did not pursue any other mental mitigation. (PCT 23)

In affirming a trial courts finding of ineffective assistance of trial counsel, the Florida Supreme Court in Mitchell v. State, 595 So.2d 938 (Fla. 1992) noted that trial counsel had defendant examined by two (2) mental health experts but did not have them testify.

Here, counsel totally failed to apprise the Court of defendant's mental deficiencies.

In Rose v. State, 675 So.2d 567(Fla. 1996) the Florida Supreme Court found trial counsel to be deficient in the penalty phase at trial. The Court stated:

> "We reach a contrary result on Rose's claim of ineffective assistance of counsel at the penalty phase. In this context, assuming there were errors, Rose "must demonstrate that but for counsel's errors he would have probably received a life sentence." *Hildwin v. Dugger*, 654 So.2d 107,*571 109 (Fla.), cert.denied – U.S. – 116 S.Ct. 420, 133 L.Ed.2d 337(1995). Such a demonstration is made if "counsel's" errors deprived [defendant] of a reliable penalty phase proceeding." *Id.* At 110 (emphasis added). The failure to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so. *Id*. at 109 -10.
>
> *** * ***
>
> "An ineffective assistance of counsel claim is a mixed question of law and fact subject to plenary review under the test set forth in *Strickland v. Washington*, 466 U.S. 668. 687, 104, S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). See *Cunningham v. Zant*, 928 F.2d 1006, 1016 (11th Cir. 1991). In order to obtain a reversal of his death sentence on the ground of ineffective

assistance of counsel, Baxter must show both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different."

* * *

"In evaluating the harmfulness of resentencing counsel's performance, we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, *Hildwin*, 654 So.2d at 110; *Santos v. State*, 629 So.2d 838, 840(Fla. 1994), and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness. *Hildwin*, 654 So.2d at 110. For example, in Baxter the court held:

> "We hold that Baxter suffered prejudice from his attorneys' failure to conduct a reasonable investigation into his background. Psychiatric mitigating evidence "has the potential to totally change the evidentiary picture." *Middleton [v. Dugger]*, 849 F.2d [491] at 495[(1988)]. We have held petitioners to be prejudiced in other cases where defense counsel was deficient in failing to investigate and present psychiatric mitigating evidence See *Stephens v. Kemp*, 846 F.2d 642, 653(11th Cir.)("prejudice is clear" where attorney failed to present evidence that defendant spent time in mental hospital", cert. denied, 488 U.S. 872, 109 S.Ct. 189, 102 L.Ed.2d 158(1988); *Blanco [v. Singletary]*, 943 F.2d [1477] at 1503; *Middleton*, 849 F.2d at 495; *Armstrong v. Dugger*, 833 F.2d 1430, 1432-34 (11th Cir. 1987) (defendant prejudiced by counsel's failure to uncover mitigating evidence showing that defendant was "mentally retarded and had organic brain damage").

See also Bassett v. State, 541 So.2d 596(Fla. 1989) holding failure to discover material non-statutory, mitigating evidence mandated a new penalty phase. If the evidence raises a "reasonable probability" the outcome of the penalty phase would be different, then a defendant is entitled to a new penalty phase.

Stevens v. State, 552 So.2d 1082 (Fla. 1989) holds that trial counsel's inaction as to mitigation may have affected the sentence imposed by the trial judge. (Jury Override of Death)

Dr. Larson's report is also significant as it reflects defendant's "improvished childhood", "beatings with an extension cord", "parents frequently drank to point of intoxication", "neighborhood a ghetto", "erratic school history", "dropped out … when he was 16", "lengthy drug abuse history", "not recommended for employability", "personality disorder". (Defendant's Exhibit #1; Post Conviction Hearing)

None of this material reached the jury or the judge. These mitigators would most certainly bolster the jury's finding of a life recommendation. It is submitted that Judge Geeker would not have a basis to override had this material been made available.

ISSUE NO. 7

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

FAILURE TO REQUEST ASSISTANCE OF CO-COUNSEL

(CONTRARY TO THE V, VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. **DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.**
2. **DEFICIENCY AND PREJUDICE PRONGS – DE NOVO BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)**

Ferrell v. State, 653 So.2d 367(Fla. 1995) appears to be the last Florida case rejecting a co-counsel in capital case argument.

Defendant believes the time has come requiring co-counsel in "death is different" cases. One person simply cannot handle the complexities of a capital case as evidenced by defense counsel's failings at trial and sentencing.

Although the law does not presently require assistance of co-counsel in death cases, this issue is presented for revisitation by this court and constitutional review.

As testified below by Trial Counsel, Mr. Etheridge, it is extremely difficult for one attorney to handle a death case. The American Bar standard recommends two (2) counselors.

Florida Rule of Criminal Procedure 3.112, provides in part:

> (d) **Appointment of Counsel.** A court must appoint lead counsel and, upon written application and a showing of need by lead counsel, should appoint co-counsel to handle every capital trial in which the defendant is not represented by retained counsel or the Public Defender. Lead counsel shall have the right to select co-counsel from attorneys on the lead counsel or co-counsel list. Both attorneys shall be reasonably compensated for the trial and sentencing phase. Except under extraordinary circumstances, only one attorney may be compensated for other proceedings.

The Rule goes on to provide qualifications for lead and co-counsel.

The time has come to require co-counsel in all death penalty cases.

It would seem that Attorney Etheridge may have avoided the numerous mistakes had he the help of co-counsel.

ISSUE NO. 8

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

CUMULATIVE EFFECT OF SPECIFIC ACTS OF INEFFECTIVE COUNSEL SET FORTH IN ISSUES 1 TO 7

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. **DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.**
2. **DEFICIENCY AND PREJUDICE PRONGS – DE NOVO BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)**

Defendant submits that the cumulative effect of specific areas of ineffective assistance of counsel demonstrates that the Strickland *supra* standards have been met. Any one of the issues should result in granting a new trial. Together the totality of the errors more than add up to reversible error and reasons for granting a 3.850 motion.

See Cherry v. State, 659 So.2d 1069 (Fla. 1995), Harvey v. Duggar, 656 So.2d 1253 (Fla. 1995), and Urquhart v. State, 676 So.2d 64 (Fla. 1st DCA 1996).

ISSUE 9

FAILURE OF THE TRIAL JUDGE TO GRANT SUGGESTION FOR DISQUALIFICATION AS TO 3.850 HEARING AND DENIAL OF MOTION TO RECONSTRUCT COURT'S RECORD

(VIOLATION OF DEFENDANT'S RIGHT TO DUE PROCESS, SECTION 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA, FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES)

STANDARD OF REVIEW – DE NOVO

BRUNO V. STATE, 807 So.2d 55 (Fla. 2002)

Defendant on August 2, 1999 filed a Motion to Reconstruct the Court's office file and for Discovery Depositions of Judge Geeker and members of his staff. (R 648) This was based on a finding that the files had been inadvertently destroyed. (R 542-544)

Defendant had filed a Judicial Records Request pursuant to Judicial Administration Rule 2.051.

Judge Geeker denied the Motion to Reconstruct and Discovery Depositions by Order entered August 24, 1999. (R 657-658) Judge Geeker's order stated defendant failed to allege any "concrete facts which would warrant such relief." (R 657) Counsel would not be able to state concrete facts without seeing the files or reconstructing them.

Judge Geeker goes on to approve his own death order. (R 657) He summarily denied the suggestion for disqualification. (R 659)

The Order stated:

> "While there may have been some overlap in recitation of facts in the sentencing order of all defendants because of the nature of the conspiracy, it is abundantly clear from the record that this Court crafted a sentencing order in conformity with State v. Campbell that dealt personally with defendant Williams, and the statutory and non-statutory mitigators applicable to him."

Defendant sought prohibition which was denied (Florida Supreme Court Case No.: 96,503) Interlocutory Appeal was filed as to these issues. The appeal was denied without prejudice to raise these issues in any 3.850 appeal. (Florida Supreme Court Case No. 96,689) Judge Geeker did not specifically rule refuting impartiality in his Order Denying the Disqualification. However, in his Order Denying Reconstruction and for Discovery Depositions, he specifically addressed defendant's claim that co-defendant sentencing orders were virtually identical, the major factual allegation indicating the Judge's impartiality. That amounted to passing on the truthfulness of the allegation in the suggestion for disqualification.

Ronald Lee Williams asserted that the sentencing orders of his co-defendants and himself are virtually identical which is an indication that Judge Geeker was predisposed to sentencing him to death. In order to further

establish this claim, he sought the office files of the Judge who sentenced him to die only to find out said files were destroyed. He then requested a reconstruction of the office files and deposition of the judge and his staff as an alternative to the actual records. He was met with a denial. In order to establish his claim of bias and predisposition on the part of Judge Geeker, Ronald Lee Williams needs to have access to what the destroyed office files contained. Since the office files are no longer available the only alternative to present his claim is for Judge Geeker to reconstruct his office files and to make himself available for deposition. Since Judge Geeker would then become a material witness in Ronald Lee Williams' cause, he can no longer sit in judgment of him. This alone creates a well grounded fear that Ronald Lee Williams would not get a fair hearing on his 3.850 motion. This fear is further cemented by the fact that Judge Geeker's death sentence was contrary to the jury's recommendation of mercy in the penalty phase. Finally, the mere suggestion that a judge had made up his mind to impose the death penalty before sentencing hearing, if true, would certainly create a well grounded fear that the same judge could not be fair in presiding over post-conviction matters.

In his Order Denying Motion for Reconstruction of Court's Files and for Discovery Depositions, Judge Geeker made a specific reference as to

why the sentencing orders of Ronald Lee Williams' co-defendants were similar to his. The judge addressed the truthfulness of Mr. Williams' claim which alone requires disqualification. See J & J Industries, Inc., 723 So. 2d 281 (Fla. 1998).

In Cave v. State, 660 So.2d 705 (Fla. 1995) the Florida Supreme Court held:

> "The hearing of evidence and the subsequent ruling on the evidence demonstrates that the judge passed on the truth of the facts alleged and adjudicated the question of his disqualification. Accordingly, we find that Judge Walsh's conduct failed to follow the procedural process outlined in Rule 2.160 and his error requires us to vacate Cave's sentence. Upon remand, we direct the chief judge of the circuit to assign a different judge for resentencing of Alphonso Cave. [FN5]

ISSUE 10

THE COURT ERRED IN DENYING DEFENDANT'S AMENDED MOTIONS FOR RELIEF UNDER RING, APPRENDI AND BLAKELY CASES

(CONTRARY TO DEFENDANT'S DUE PROCESS RIGHT AND TRIAL JURY RIGHTS UNDER SECTION 16, FLORIDA CONSTITUTION AND AMENDMENTS V, VI AND XIV, CONSTITUTION OF THE UNITED STATES)

STANDARD OF REVIEW – DE NOVO

BRUNO V. STATE, 807 So.2d 55 (Fla. 2002)

Defendant's first amended motion was based upon Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002).

The grounds set forth in the First Amended/Supplemental 3.850 filed August 5, 2002 was that Ronald Lee Williams' death penalty was unconstitutionally applied in that his jury determined facts in his favor to recommend life imprisonment and the trial court improperly determined facts to impose a death override.

The second motion filed August 30, 2004 was based upon Blakely v. Washington, 542 U.S. 296(2004), 124 S.Ct. 2531(2004).

Florida has ruled in King v. Moore, 831 So.2d 143(Fla. 2002) that Ring does not apply to Florida's death penalty statute and affirmed King's

death sentence. The difference in King was a 12 – 0 vote for death as opposed to 11 – 1 for life in the instant case.

In 2004, the U.S. 7th Circuit in Lambert v. McBride, 365 F.3d 557(U.S. 7th Cir. 2004) held Ring not to be retroactive. See also Turner v. Crosby, 339 F.3d 1247(U.S. 11th Cir. 2003) and Schriro v. Summerlin, 124 S.Ct. 2519 (2004) also held Ring not to be retroactive.

However, Defendant submits the issue of constitutionality of the death penalty imposed here is not one of retroactivity for procedural issues. Rather the facts are controlled by Blakely v. Washington, 124 S.Ct. 2531 (2004) wherein Justice Scalia held:

> "Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. (Emphasis Added)."

Blakely involved a trial judge's increase in sentence. Whether the judge's authority to impose an enhanced sentence depends upon a specified fact, one of several specified facts or any aggravating fact it remains the case that the jury's verdict alone does not authorize the sentence.

SUMMARY OF ARGUMENT

Defendant's trial counsel fell far below Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) standards for effective assistance claims. The cumulative effect of the errors makes it even more serious than any one issue alone.

Judge Geeker's failure to disqualify himself in the 3.850 proceeding and his persistent overrides in related cases gave Defendant little chance to prevail in a post-conviction proceeding.

Lastly, Defendant asserts that the Blakely decision states that the jury trial right is a fundamental right and not procedural. This should change the failure to grant retroactively in previous cases.

CONCLUSION

Defendant urges this court grant him a new trial based upon trial counsel deficient performance in a death case. Defendant further requests disqualification of Trial Judge Geeker for his statements at sentencing and denial of reconstruction of his office files.

Defendant submits Blakely changes retroactivity decisions as to post-conviction relief.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210 (a)(2), the Appellant certifies that this brief has 1 inch margins and 14-point Times New Roman font.

_____

JOSEPH F. MCDERMOTT, ESQUIRE
MCDERMOTT LAW FIRM, P.A.
7116-A Gulf Blvd.
St. Pete Beach, FL 33706
Ph: (727) 367-1080, Fx: 367-9940
SPN: 00002251, FBN: 052469
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail to the Office of the State Attorney, Pinellas County, P.O. Box 5028, Clearwater, Florida, 33758, this the _____ day of _____, 2005.

_____

JOSEPH F. MCDERMOTT, ESQUIRE
MCDERMOTT LAW FIRM, P.A.
7116-A Gulf Blvd.
St. Pete Beach, FL 33706
Ph: (727) 367-1080, Fx: 367-9940
SPN: 00002251, FBN: 052469
ATTORNEY FOR APPELLANT